

No. 82-1868

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In the Supreme Court of the United States

October Term, 1982

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ARNOLD TRANSIT COMPANY, INC., STRAITS TRANSIT COMPANY and SHEPLER'S INCORPORATED,

*Appellants*

THE CITY OF MACKINAC ISLAND, a Charter City,  
incorporated pursuant to Local Acts 1899, No. 437,

*Appellee*

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ON APPEAL FROM THE SUPREME COURT  
OF MICHIGAN

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MOTION TO DISMISS OR AFFIRM

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## TABLE OF CONTENTS

INDEX OF AUTHORITIES .....	I
MOTION TO DISMISS OR AFFIRM .....	1
Introduction .....	1
Federal Preemption .....	2
Tonnage Tax .....	11
Undue Burden on Interstate Commerce .....	15
Freedom to Travel .....	23
Equal Protection and Due Process .....	25
Conclusion .....	30

### APPENDIX—

Appellants' Framing of the Issues in the Michigan Supreme Court .....	31
49 U.S.C. §903(g) .....	32

## INDEX OF AUTHORITIES

### Federal Cases

<i>Charter Limousine, Inc. v. Dade County Board of County Commissioners</i> , 678 F.2d 586 (5th Cir., 1982) .....	18
<i>Commonwealth Edison Company v. Montana</i> , 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981) .....	4, 5
<i>Commonwealth of Pennsylvania v. Nelson</i> , 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956) .....	3, 4, 9
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) .....	22
<i>Conway v. Taylor's Executor</i> , 66 U.S. (1 Black) 603, 17 L. Ed. 191 (1861) .....	6, 8
<i>Covington and Lexington Turnpike Road Co. v. San- ford</i> , 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896) .....	27
<i>Crandall v. Nevada</i> , 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1868) .....	22

## II

<i>Dean Milk Co. v. City of Madison</i> , 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951) .....	20
<i>Evansville-Vandenburg Airport Authority District v. Delta Airlines</i> , 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) .....	22, 24
<i>Harmon v. City of Chicago</i> , 147 U.S. 396, 13 S. Ct. 306, 37 L. Ed. 216 (1893) .....	14
<i>Inman Steamship Co. v. Tinker</i> , 94 U.S. 238, 24 L. Ed. 118 (1877) .....	14
<i>Knoxville Water Co. v. Mayor and Aldermen of the City of Knoxville</i> , 200 U.S. 22, 26 S. Ct. 224, 50 L. Ed. 353 (1906) .....	7
<i>Mateo v. Auto Rental Company, Ltd.</i> , 240 F.2d 831 (9th Cir., 1957) .....	17
<i>Moran v. City of New Orleans</i> , 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884) .....	14
<i>Packet Company v. Keokuk</i> , 95 U.S. 80, 24 L. Ed. 377 (1877) .....	11
<i>Parkersburg &amp; Ohio River Transport Co. v. Parkersburg</i> , 107 U.S. 691, 2 S. Ct. 732, 27 L. Ed. 584 (1883) .....	14
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) .....	22
<i>Reagan v. Farmers' Loan &amp; Trust Co.</i> , 154 U.S. 420, 14 S. Ct. 1062, 38 L. Ed. 1031 (1894) .....	27, 28
<i>Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge</i> , 36 U.S. (11 Pet.) 420, 9 L. Ed. 773 (1837) .....	6
<i>The Steamer Daniel Ball v. United States</i> , 77 U.S. (10 Wall.) 557, 19 L. Ed. 999 (1870) .....	19
<i>Tigner v. State of Texas</i> , 310 U.S. 141, 60 S. Ct. 879, 84 L. Ed. 1124 (1940), reh. den. 310 U.S. 659, 60 S. Ct. 1092, 84 L. Ed. 1422 .....	27
<i>United States v. Raines</i> , 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) .....	23

### III

<i>United States v. Yellow Cab</i> , 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 210 (1947) .....	15, 16, 17, 18
<i>United Truck Lines, Inc. v. United States</i> , 216 F.2d 396 (9th Cir., 1954) .....	8
<i>Warth v. Seldin</i> , 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) .....	23
<i>Wiggins Ferry Co. v. City of East St. Louis</i> , 107 U.S. 365, 2 S. Ct. 257, 27 L. Ed. 419 (1883) .....	13, 14

### Federal Legislation

49 U.S.C. §901, <i>et seq.</i> .....	3
49 U.S.C. §903(g) .....	3, 5
49 U.S.C. §10101, <i>et seq.</i> .....	3
49 U.S.C. §10102(27) .....	5
49 U.S.C. §10102(29) .....	6
49 U.S.C. §10544 .....	4, 5

### Constitutions

Constitution of the United States—	
Article I, Section 8, Clause 3 .....	15
Article I, Section 10, Clause 3 .....	11, 13
Constitution of Michigan, 1963—	
Article VII, Section 30 .....	8

### State Court Decisions

<i>Bell v. Clegg</i> , 25 Ark. 26 (1867) .....	9
<i>City of Laredo v. Martin</i> , 52 Tex. 548 (1878) .....	8-9
<i>Guinn v. Eaves</i> , 101 S.W. 1154 (Tenn., 1906) .....	8
<i>Hudson v. Cuero L &amp; E Co.</i> , 47 Tex. 56 (1877) .....	8
<i>Mascony Transport and Ferry Service, Inc. v. Mitchell</i> , 94 Misc. 2d 618, 405 N.Y.S.2d 380 (1978) .....	5
<i>Nixon, et al. v. Reid</i> , 67 N.W. 57 (S.D., 1896) .....	9
<i>Shorter, et al. v. Smith, et al.</i> , 9 Ga. 517 (1851) .....	7

#### IV

### Old English Cases

<i>Hammerton v. Earl of Dysart</i> , 1 A.C. 57 (1916) .....	8
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### Motor Carrier Cases

<i>Motor Transportation of Passengers Incidental to Transportation by Aircraft</i> , 95 M.C.C. 526 (1964) ....	18
<i>James T. Kimball - Petition for Declaratory Order</i> , 131 M.C.C. 908 (1980) .....	18

### Secondary Sources

3 McQuillin Municipal Corporations (3rd edition), §11.08 .....	10
3 McQuillin Municipal Corporations (3rd edition), §11.16 .....	10
78 Am. Jur. 2d, Waters, §76, p. 519 .....	19

## **MOTION TO DISMISS OR AFFIRM**

NOW COMES the Appellee, City of Mackinac Island, pursuant to Rule 16, and moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Michigan on the grounds that the appeal does not present a substantial federal question and that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

## **INTRODUCTION**

Mackinac Island is a small, summer resort island located between Michigan's Upper and Lower Peninsulas. Its unique appeal to tourists is that there are no cars on the Island - transportation is by horse-drawn carriages and bicycles. The Island's architecture and lifestyle is still much the same as it was in the late 1800's. Tourists may visit the Grand Hotel or browse in the quaint shops along Main Street. Mackinac Island fudge is perhaps the most famous souvenir.

Most of the ferries to and from Mackinac Island run from May or June until September or October. One ferry runs from April through December. During the winter, the Island's 600 year-around residents travel the five miles across the straits to St. Ignace on snowmobiles - when the ice permits or by a small airplane.

The City Council of Mackinac Island passed the Ferry Boat Code ordinance in 1977. The Appellants challenged the validity of the ordinance in the Mackinac County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court. Numerous arguments were raised. By way of example, Appellants' Brief to the Michigan Supreme Court contained eight separately identified issues, most of which were directed at the validity of the ordinance under state law. (See Appellee's Appendix, p. 16).

The City of Mackinac Island has prevailed on every issue in every court. Counting the Circuit Judge, the unanimous Michigan Court of Appeals panel, the unanimous Michigan Supreme Court decision and the unanimous decision to deny rehearing by a differently constituted Michigan Supreme Court, ten Judges or Justices have considered the arguments of Appellants and all ten have fully upheld the validity of the ordinance.

Although Appellants identify two "Questions Presented", it appears that their appeal involves five challenges to the Ferry Boat Code. They contend 1) that the Federal Government has preempted the field of ferryboat regulation, thereby precluding any state or municipal legislation; 2) that the ordinance's franchise fee violates the Constitution's prohibition of a "duty of tonnage"; 3) that the ordinance imposes an undue burden on interstate commerce; 4) that the ordinance violates ferry passengers' freedom of travel; and 5) that the ordinance denies the ferryboat companies equal protection and due process of law.

Through the arguments set forth in this Motion, the Appellee will examine each of the challenges presented by Appellants and demonstrate that none raises a federal issue that is substantial and worthy of further briefing and argument before this Court, and that, therefore, this Court should either dismiss the appeal or affirm the judgment of the Michigan Supreme Court.

### **FEDERAL PREEMPTION**

In their argument that Congress has acted to preempt control of the entire subject of ferry boats, the Appellants have misstated both the facts and the law applicable to this case. A closer examination of both shows that Congress not only had no intention of preempting local control of ferries such as these, but in fact expressly provided for such local control.

This Court discussed the doctrine of federal preemption in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), and set forth the criteria to be used to determine "whether a federal statute has occupied a field in which the States are otherwise free to legislate." 350 U.S. at 501.

"First '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at page 230, 67 S. Ct. at page 1152. . . . Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at page 230, 67 S. Ct. at page 1152, citing *Hines v. Davidowitz*, supra. . . . Third, enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program." 350 U.S. at 502-505. (Original emphasis).

Appellants' claim of federal preemption of the field of ferry boats is based on part III of the Interstate Commerce Act, 49 U.S.C. §901, *et seq.*, and the revised Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* Appellants argue that those two statutes have dominated the area so completely that neither states nor municipalities may seek to legislate regarding ferries.

In fact, however, both the original and the revised Interstate Commerce Acts expressly provide for state control of certain aspects of water carrier services. Section 903(g) of the original Act provided in part:

"(g) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, *the provisions of this chapter shall not apply.* . .

(2) . . . to ferries, . . ." (Emphasis supplied).

The exclusion of ferries from the jurisdiction of the Interstate Commerce Commission was continued in Section 10544 of the revised Act, enacted in 1978.

"(a) Except to the extent the Interstate Commerce Commission finds it necessary to exercise jurisdiction to carry out the transportation policy of section 10101 of this title, *the Commission does not have jurisdiction under this subchapter over transportation by water carrier when the transportation is provided—* . . .

(4) *by a ferry.*" (Emphasis supplied).

Thus, in defining the ICC's jurisdiction over a period of years, Congress has consistently left ferries, matters of a particularly local nature, under the control of local authorities. This express exclusion rebuts any claim by Appellants that "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." 350 U.S. at 502. It is also an expression of congressional intent that the area is not one in which the federal interest is so dominant that the federal system must be assumed to preclude adoption of state laws on the same subject. Further, where ferries have been excluded from ICC control, there is little likelihood of "conflict with the administration of the federal program." 350 U.S. at 505.

This case is analogous in this respect to *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). In that case, the appellants argued that a general declaration by Congress favoring the use of coal over natural gas products constituted preemption of the field such that the states could enact no legislation that might have an adverse impact on the use of coal. In holding that such a general policy did not constitute preemption of the field, this Court, citing prior decisions, stated:

"As we have frequently indicated, '[p]re-emption of state law by federal statute or regulation is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."'" 453 U.S. at 634.

The Court then examined the provisions of the Powerplant and Industrial Fuel Use Act, the source of the claimed preemption, and found an express recognition of State severance taxes such as the ones being challenged. This recognition was held to preclude a finding of federal preemption. "This section clearly contemplates the continued existence, not the preemption, of state severance taxes on coal and other minerals." 453 U.S. at 635. Similarly here, with 49 U.S.C. §10544, Congress recognized and incorporated the tradition of local control of ferry boats, and did not provide for preemption of state involvement in the area. In fact, the same argument presented by Appellants herein was rejected recently by a New York state court. In *Mascony Transport and Ferry Service, Inc. v. Mitchell*, 94 Misc. 2d 618, 405 N.Y.S.2d 380 (1978), decided under 49 U.S.C. §903, the Court noted the express exclusion of ferries from ICC control and ruled that the states have the authority to franchise ferries.

Appellants next assert that their boats are not ferries because they fit the definitions of "vessel", "water carrier" and/or "water common carrier" provided by the Act. This in itself, however, does not prevent Appellants' boats from also being ferries. It may be safely assumed that any ferry boat is "a watercraft or other artificial contrivance that is used, is capable of being used, or is intended to be used as a means of transportation by water." 49 U.S.C. §10102(27) (definition of "vessel"). It would be a useless ferry indeed that could not be used for "transportation by water", and that did not hold "itself out to the general public to provide [such] transportation for compensation."

49 U.S.C. §10102(29) (definition of "water common carrier"). If ferries were not expressly excluded, they would otherwise be covered by the Act, falling as they do within a number of the definitions. The fact that they are separately excluded shows that they may also be "vessels", "water carriers" or "water common carriers". There would be no need to expressly exclude them if by definition they were not covered.

Nor does Appellants' argument that they are not "traditional ferries" such as those found under Olde English law save them. There is no reason to assume that Congress, in enacting the Interstate Commerce Acts, adopted a definition of "ferry" that has been rejected by American legislatures and courts as inconsistent with the American experience. The Michigan Courts uniformly rejected the novel, but inaccurate and unsupported "definition" of a ferry resurrected here by the Appellants.

Contrary to Appellants' assertions, this Court has not ruled that a ferry franchise must be exclusive. The state statute at issue in *Conway v. Taylor's Executor*, 66 U.S. (1 Black) 603, 17 L. Ed. 191 (1861), provided that no ferry should be established within one and one half miles from any other ferry barring certain unusual circumstances. No such circumstances had been alleged, and this Court ruled that the original ferry owner was entitled to the protection provided by state law—that was, an exclusive franchise for one and one half miles in either direction. This Court most certainly did not say, as Appellants claim, that a ferry franchise *must* be exclusive. Further, in the landmark case of *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 9 L. Ed. 773 (1837), involving a bridge franchise, this Court analogized to ferry franchises, and held that a franchise is presumed to be non-exclusive unless it specifically provides otherwise. Not only did this Court recognize that a franchise does not have to be exclusive, but

it expressed an obvious preference for the lack of exclusivity in franchises granted by states. See also, *Knoxville Water Company v. Mayor and Aldermen of the City of Knoxville*, 200 U.S. 22, 26 S. Ct. 224, 50 L. Ed. 353 (1906).

Courts in the United States have long recognized that exclusive ferry franchises are undesirable and contrary to American principles of competition and free enterprise. In *Shorter, et al. v. Smith, et al.*, 9 Ga. 517 (1851), the Supreme Court of Georgia discussed the issue of exclusivity of ferry franchises in these terms:

"It is contended in behalf of the Plaintiffs . . . that by the Common Law that has been adopted in this State, their franchise, although not declared so, is necessarily exclusive; and that the Legislature cannot, either directly or indirectly interfere with it, so as to destroy or materially impair its value; . . .

"And such, we concede, was the ancient doctrine in England. . . .

"[I]n some of the earlier cases in this country, the Courts held that these franchises, whether expressed or implied, are so to be construed as to exclude all contiguous competition. . . .

"But such is no longer the doctrine in this country. And notwithstanding the profound regrets expressed by Chancellor Kent at its overthrow, I must be permitted to say, that such a doctrine, in my opinion, is at war with the universally recognized principles of American constitutional law and totally inapplicable to our local situation and change of circumstances." 9 Ga. at 523-524.

Clearly, the *Shorter* court considered itself to be dealing with the same type of entity considered a "ferry" in England, but it did not find exclusivity to be consistent with American law or practice.

The other "characteristics" identified by Appellants fare no better when examined individually. Appellants

claim that because they own the wharves at which their boat docks, they are not "traditional ferries". Actually, the ferries in many of the Olde English cases also operated from private property near a public highway and this was not found to diminish their character as public ferries. *Hammerton v. Earl of Dysart*, 1 A.C. 57 (1916). Further, American state courts have frequently given effect to state statutes governing ferry franchises which provide a preference for applicants owning land on at least one end of the ferry's route. *Guinn v. Eaves*, 101 S.W. 1154 (Tenn., 1906); *Hudson v. Cuero L & E Co.*, 47 Tex. 56 (1877). Even the protected franchise holder in *Conway v. Taylor's Executor*, *supra*, cited by Appellants, owned the property from which he ran his ferry.

In *United Truck Lines, Inc. v. United States*, 216 F.2d 396 (9th Cir., 1954), the Ninth Circuit expressly rejected as "specious" the argument Appellants make here regarding ownership of the wharves.

"Appellants argue, however, that the ferry in this instance can not be thought a continuation of a highway because, they say, the chain of continuity has been broken by the privately owned character of the road approaches on either side of the river. The argument is specious. By the very nature of a ferry the approaches to it are a necessary incident to its operation and are an integral part of the ferry owner's responsibility. In this case the short stretches of roadway connecting on either side with county highways are to be taken as part of the ferry service itself." 216 F.2d at 399.

Nor is it necessary, as Appellants assert, that a ferry be perpetual. Michigan's Constitution expressly prohibits any city from granting a franchise for a period of more than thirty years. 1963 Michigan Constitution, Article VII, Section 30. Other states have also recognized that a ferry franchise need not be perpetual. *City of Laredo*

*v. Martin*, 52 Tex. 548 (1878) (where a ferry franchise was granted for a period of 20 years); *Bell v. Clegg*, 25 Ark. 26 (1867) (5 years); *Nixon, et al. v. Reid*, 67 N.W. 57 (S.D., 1896) (5 years). Whatever the rule in England, the prevailing practice in the United States has been to limit ferry franchises to a term of years.

Clearly then, when Congress expressly excluded ferries from the ICC's jurisdiction in both the original and the revised Interstate Commerce Acts, it was declaring an intent not to interfere with local control of "ferries" as they have been defined under American common law, the statutes of the several states and this Court. Clearly also, the boats operated by Appellants are "ferries" within the meaning of the Act.

Appellants' last argument is a claim that the federal government has preempted control of all navigable waters. Analysis of this claim under the tests set forth above from *Commonwealth of Pennsylvania v. Nelson, supra*, shows that once again there has been no attempt by Congress to preempt the field so as to preclude state legislation regarding ferries. In support of this proposition, Appellants have quoted incompletely and misleadingly from McQuillin, *Municipal Corporations* (3rd ed). Far from suggesting that the Congress has preempted state control of navigable waters, McQuillin acknowledges the power vested in states and municipal authorities to exercise control over navigable waters and to franchise ferries. The quote which Appellants provided in their Statement continues as follows:

"Navigable waters are primarily under the control of the government of the United States, with limited powers in the several states. A state may legislate concerning the disposition and use of navigable waters within its boundaries, subject, however, to the paramount authority of Congress over interstate commerce and navigable waters, and subject to vested private

property rights and the trust under which the state holds such lands for the benefit of the public. The state may delegate its powers over navigable waters within or adjacent to a municipal corporation. . . .” 3 McQuillin, *Municipal Corporations* (3rd ed.) §11.08, p. 14.

“The state may authorize a municipal corporation to establish and license ferries, and in some states the statute expressly authorizes municipalities to establish and acquire ferries, and to maintain, regulate and fix the tolls on ferries. The right to operate ferries around a city may carry with it the right to charge fares for the use of the facility by any person who chooses to avail himself of that use, whatever his residence.” 3 McQuillin, *Municipal Corporations* (3rd ed.) §11.16, pp. 26-27.

Appellants also raise the spectre of conflicting regulations between franchises, but fail to note that the City of Mackinac Island derives its authority to franchise from its charter. The other two cities on Appellants’ routes have different charters. It has never been shown that the charters of the other two cities give them the power to issue such franchises. Certainly they have never attempted to do so. Further, there is no conflict between the franchises issued by the City of Mackinac Island and any federal statute or regulation. As discussed herein, the two authorities operate in different spheres and without overlap.

In conclusion, absolutely nothing indicates that the federal government intended to preclude local control of ferry boats between three small towns in Michigan. Far from being a vital concern to this Court, this argument presents issues of only local concern, and no further treatment by this Court is necessary.

## TONNAGE TAX

The Appellants maintain that the franchise fee is a "duty of tonnage" which is forbidden by Article I, Section 10(3) of the U.S. Constitution. Appellants' challenge to the ordinance pursuant to its tonnage tax theory can be easily discounted by reflecting upon the essence of the tonnage tax prohibition and contrasting that with the essence of the Ferry Boat Code franchise fee. The constitutional provision prohibiting the imposition of a "duty of tonnage" was to prevent local units of government from improperly interfering with our fledgling nation's trade. The objects of its prohibition were fees imposed by the localities without any justification except their taxing authority. The courts recognized, however, that it was not intended to prevent the localities from seeking remuneration for services or benefits provided to the vessels. The most common example of this latter, permissible type of fee was a fee for the use of a city-owned wharf. The wharfage charge was permissible because the vessel received a benefit (the use of the wharf) in exchange for the fee.

This distinction between a tax and a fee demanded for a direct benefit received is set forth in *Packet Company v. Keokuk*, 95 U.S. 80, 24 L. Ed. 377 (1877). "But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. . . . It is a tax on a duty that is prohibited; something imposed by virtue of sovereignty, not claimed in right or proprietorship." 95 U.S. at 84-85.

The fundamental justification for the wharfage fee was not because the use of a city-owned wharf was involved, but because the city was providing some benefit or service in exchange for the fee. The nature of the benefit or service was not critical. What was critical was whether the city was providing some valuable con-

sideration for the fee. If there was valuable consideration, then it was not a tonnage tax and was not constitutionally forbidden.

In the case before this Court, the ferryboat franchise fee is paid to the City of Mackinac Island as consideration for a valuable property right, which is the ferryboat franchise. Appellants may claim that it is a tax and that they receive no benefits from the City of Mackinac Island in exchange for the franchise fee, but the Michigan courts have resolved this state law issue against the Appellants.

The trial court ruled:

"A franchise fee is not a tax. It is a price paid for a franchise or public right vested in an individual. . . . When a city grants a franchise it is conferring upon the franchisee a valuable property right for which payment is appropriate. The amount required to be paid pursuant to the granting of a franchise is consideration for the transfer of a property right." (Appellants' Appendix, p. 36a).

"... the Court concludes that the franchise fee charged by the city is a quid pro quo for the property right of operating a ferry. . ." (Appellants' Appendix, p. 37a).

In its unanimous decision, the Michigan Court of Appeals ruled:

"... a franchise is a right (sometimes referred to even as a property right) granted for a consideration." (Appellants' Appendix, p. 5a).

The Court of Appeals also ruled that the City of Mackinac Island may charge a fee for the granting of the ferry franchise since ferry franchises are considered "... grants of rights at least approaching property rights for which a consideration can be exacted." (Appellants' Appendix, p. 8a). The Michigan Supreme Court unanimously affirmed these rulings.

Thus, in spite of the Appellants' reluctance to acknowledge it, the franchise fee is not a tax, but is a payment in exchange for a specific benefit which they receive from the City and which is not provided to the public in general.

The controlling case which contrasts franchise fees and tonnage taxes is *Wiggins Ferry Co. v. City of East St. Louis*, 107 U.S. 365, 2 S. Ct. 257, 27 L. Ed. 419 (1883). The facts of that case were remarkably similar to those of the present case. There, a ferry traveled across the Mississippi River between East St. Louis, Illinois and a point in Missouri. The ferries never used or employed any wharf or landing belonging to the City of East St. Louis. East St. Louis required what it referred to as a "license" fee as a prerequisite to operating a ferry. The Supreme Court recognized that by this act, a ferry franchise was granted.

The ferry company in *Wiggins* challenged the license/franchise fee on several bases, including the allegation that it was a duty of tonnage prohibited by Article I, Section 10, Clause 3 of the United States Constitution. The United States Supreme Court categorically rejected that theory. It found that the fee was not at all like the tonnage tax which was prohibited by the Constitution. It recognized the ferry franchise as personal property for which a fee must be paid.

"We are of the opinion, therefore, that it is not a duty of tonnage, nor is it in its essence a contribution claimed for the privilege of using a navigable river of the United States or of arriving or departing from one of its ports and is, therefore, not prohibited by the Constitution of the United States." 107 U.S. at 376.

Instead, the Court found the fee to be a "license" fee which was "laid on the business of keeping a ferry," 107 U.S. at 376, and which was not prohibited by the United States Constitution.

Appellants cite numerous cases in which some kind of a fee was struck down as an unconstitutional tonnage tax. None of those cases, however, is applicable to the present case. None of them involved franchise fees on ferry boats. (Interestingly enough, in *Parkersburg and Ohio River Transport Company v. Parkersburg*, 107 U.S. 691, 2 S. Ct. 732, 27 L. Ed. 584 (1883), ferries were expressly excluded from the ordinance.) In most of the cases, the tonnage tax was exacted upon all boats or vessels coming into or tying up in the local harbor. The localities claimed no right to franchise those boats. Therefore, they could offer no franchise in exchange for the fee they were imposing. The Court in *Inman Steamship Co. v. Tinker*, 94 U.S. 238, 24 L. Ed. 118 (1877), while striking the levy in that case, noted the lack of a benefit in exchange for the fee. "[I]t is exacted where there is nothing to be paid for." 94 U.S. at 245. The City of Mackinac Island Ferry Boat Code does not apply to all boats which come into the harbor at Mackinac Island, only to those persons operating public ferry services to and from Mackinac Island, who the Michigan Supreme Court has ruled the City may properly franchise and charge a franchise fee.

Two of the cases cited by Appellants, *Harmon v. City of Chicago*, 147 U.S. 396, 13 S. Ct. 306, 37 L. Ed. 216 (1893) and *Moran v. City of New Orleans*, 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653 (1884), did involve "license" fees, but those were for tugboats and there was no suggestion of a requirement for a franchise in order to operate tugboats, as there is for ferries. None of the cases cited by the Appellants is instructive.

The U. S. Supreme Court in *Wiggins, supra*, has considered a ferryboat franchise fee and has found it not to conflict with the United States Constitution's prohibition against a duty of tonnage. The Appellants' thesis presents no substantial federal question and further consideration by this Court is unnecessary.

## UNDUE BURDEN ON INTERSTATE COMMERCE

Appellants assert that the Ferry Boat Code imposes an undue burden on interstate commerce. It is the position of the Appellee that this is not a meritorious issue.

First, and of foremost importance, the Appellants have not shown that their ferryboats operate in interstate commerce. Unless the Appellants establish this, no burden on interstate commerce in violation of the United States Constitution can exist. The Trial Court correctly ruled that the Appellants are not operating in interstate commerce. The Court of Appeals found the Appellants' contentions in this regard to be "without merit" and the Michigan Supreme Court unanimously affirmed.

The commerce clause, Article I, Section 8, Clause 3, of the U.S. Constitution, confers upon the Congress the power "to regulate commerce with foreign nations, and among the several States. . . ."

The facts undeniably establish that the ferryboats are not operating in interstate commerce. Their routes take them from one of two points within the State of Michigan (either St. Ignace or Mackinaw City) to Mackinac Island, also within the State of Michigan. Both the points of embarkation and destination are within the State of Michigan. They travel a direct route, never leaving the waters of the State of Michigan. The Appellants' ferryboats are subject to the laws of no other state than Michigan.

Overwhelming legal authority demonstrates that Appellants' ferries are not engaged in interstate commerce. In *United States v. Yellow Cab*, 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 210 (1947), several taxicab companies were alleged to have conspired to restrain and monopolize trade in violation of the Sherman Act. Their passengers included those transferring between rail stations, those traveling from rail stations to homes or offices, and those traveling between other points in Chicago. It was argued

that since they served some passengers who were transferring between rail stations as part of a continuing interstate journey, the taxis were in interstate commerce. The Supreme Court reasoned that, except with respect to operations pursuant to specific contractual arrangements with railroad companies, the taxis' "relationship to interstate transit is only casual and incidental." 332 U.S. at 231.

In ruling that the taxis were not engaged in interstate commerce, this Court stated:

"Interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. . . . What may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations." 332 U.S. at 231.

For travel wholly within one state to be in interstate commerce, it must be part of a continuous interstate journey. A ferryboat shuttle trip to Mackinac Island is a uniquely local excursion. It is not part of any continuous interstate journey. It has been stipulated by the parties that 95% of the passengers who ride the ferries arrive at the docks by their own private automobiles. (Appellants' Jurisdictional Statement, pp. 2-3). According to the testimony of Mr. Hugh Rudolph, General Manager of Appellants Arnold Transit Company and Straits Transit Company, 98% of their passengers purchase round trip tickets which would take them to Mackinac Island and then back to the point of beginning. (Trial Transcript, p. 88). The remaining 2% would be one way tickets since the ferries travel only from Mackinaw City to Mackinac Island and back or from St. Ignace to Mackinac Island and back. The ferries do not travel to any other cities, nor is Mackinac Island an intermediate stop in a trip from Mackinaw

City to St. Ignace or vice versa. A ride on one of Appellants' ferries can hardly be described as an integral part of a continuous interstate journey.

Certainly, the mere fact that some of the passengers reside in states other than Michigan does not, as Appellants suggest, automatically place the Appellants in interstate commerce. If that theory is true, every local system of transportation, including all intra-city buses and taxis would be in interstate commerce if they accepted passengers who lived out of state. Even the horse drawn carriages transporting visitors around Mackinac Island would be in interstate commerce since they carry persons living in states other than Michigan. Such a determination would clearly violate the admonition of the Supreme Court in *Yellow Cab* to be intensely practical in defining the scope of interstate commerce.

Following the guideline set out in *Yellow Cab*, the Ninth Circuit, in *Mateo v. Auto Rental Company, Ltd.*, 240 F.2d 831 (9th Cir., 1957), held that a limousine service operating out of the Honolulu Airport was not engaged in interstate commerce. The limousine service transported airline and steamship passengers to and from Honolulu International Airport or the Port of Honolulu and the downtown and Waikiki districts. Fifty percent of the passengers had pre-paid and/or pre-arranged the limousine service prior to leaving their departure point. Citing the *Yellow Cab* standard, the court noted that the ultimate test in determining whether Auto Rental Company was engaged in interstate commerce was "... whether the local transportation service is an integral step in the interstate movement." 240 F.2d at 833. The court held that no interstate commerce was involved, noting that when a person arrived at the Honolulu Airport he or she had "arrived" in Hawaii in the commonly accepted sense. The court said that "Those who thereafter furnish him transportation are engaged in activity of a purely local nature." 240 F.2d at 835.

The Interstate Commerce Commission, also following the *Yellow Cab* doctrine, has determined that motor carriers which operate out of airports are not in interstate commerce unless they operate by means of through ticketing arrangements including contracts between two or more different transportation systems. *Motor Transportation of Passengers Incidental to Transportation by Aircraft*, 95 M.C.C. 526 (1964).

In *James T. Kimball - Petition for Declaratory Order*, 131 M.C.C. 908 (1980) the Commission ruled that an airport limousine service which provided ground transportation between two Florida airports and hotels located within 25 miles of the airports, and which operated as part of a one price package tour originating at points outside of Florida, and which was organized by a travel and tour agency located outside of Florida, was not in interstate commerce.

The Fifth Circuit U. S. Court of Appeals recently described a somewhat broader standard for determining whether a mode of transportation is in interstate commerce. Even under that standard, Appellants are still clearly not operating in interstate commerce. In *Charter Limousine, Inc. v. Dade County Board of County Commissioners*, 678 F.2d 586 (5th Cir., 1982), Charter Limousine operated a limousine service between Miami International Airport and surrounding counties. Operating as part of a complex nationwide reservation system, Charter carried passengers who had pre-arranged their transportation through this national system before arriving at Miami International Airport on flights from other states. While the Fifth Circuit found Charter to be operating in interstate commerce, it did so only because of the unique nationwide system of pre-arranging travel. The opinion makes it clear that the mere fact that passengers using Charter's services had traveled from states other than Florida was not significant.

The Appellants' ferryboats are far more of a local enterprise than any of the carriers involved in the above-described cases. It is abundantly clear that under any of those criterion, Appellants are not operating in interstate commerce.

Appellants present sparse authority in support of the notion that they are operating in interstate commerce. The fact that the ferries travel navigable waters does not mean that they are necessarily in interstate commerce. Appellants would apparently contend that every fisherman and weekend sailor who ventures onto the Great Lakes is also in interstate commerce.

The definition of navigable waters in this country is very broad. It is an entirely different question from the question of whether a vessel is engaged in interstate commerce. Navigable waters include any body of water upon which a boat can float. Individuals traversing those navigable waters may or may not be in interstate commerce. The test depends upon the nature of the activity, not upon the body of water involved. The general rule is that the states have the power to regulate and control navigable waters within their own boundaries. 78 Am. Jur. 2d, Waters, §76, p. 519. Thus, the mere fact that ferries travel on navigable waters, does not place them in interstate commerce.

*The Steamer Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 19 L. Ed. 999 (1870) does not support Appellants' theory. There, the issue was whether the steamboat was traveling on navigable waters. A federally enacted statute applied to all vessels upon "the bays, lakes, rivers, or other navigable waters of the United States. . ." 77 U.S. at 558. The Supreme Court merely concluded that the river on which the steamboat traveled was a navigable river and that Congress was within the scope of its permissible authority when it adopted the legislation. That case should not be seen as compelling the

conclusion that the ferryboats transporting summer tourists back and forth to Mackinac Island are in interstate commerce.

*Dean Milk Company v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951) simply does not stand for the proposition for which Appellants cite it. That case involved a challenge by an Illinois milk distributor to a Madison, Wisconsin ordinance prohibiting the sale of milk within the city unless it had been pasteurized within five miles of the center of the city. The Court simply concluded that such an arbitrary and unnecessary restriction unfairly discriminated against interstate commerce. The question of whether the milk distributor was in interstate commerce was not addressed. *Dean Milk's* fact situation and holding are totally inapplicable to the present situation.

In determining whether the ferryboats are operating in interstate commerce, the actions and statements of the Appellants themselves are enlightening. Of the three ferryboat companies which are parties to this litigation, only one, Arnold Transit Company, has filed a tariff with the Interstate Commerce Commission. The fourth ferryboat line, the Star Line, is not a party to this appeal, but joins Shepler's, Inc. and Straits Transit Company in never having filed with the Interstate Commerce Commission. If Appellants Straits Transit Company and Shepler's Inc. actually believe that they are engaged in interstate commerce, why have they made no attempt to file with the Interstate Commerce Commission? The Appellants cannot be taken seriously when they claim to be in interstate commerce since if it is true, two of the three Appellants (plus the Star Line) would have been intentionally violating the law by failing to subject themselves to the authority of the Interstate Commerce Commission.

Even Arnold Transit Company, the only ferry company which had any contact with the ICC, concedes that its interstate involvement is insignificant. At trial, Mr. Hugh Rudolph, General Manager of Arnold Transit Company, testified that of a total passenger revenue of \$1,154,710.00, only \$10,046.00 was derived from non-resident passengers. Thus, by the Arnold Transit Company's own admission, only about one-eighth of one percent of their passengers could be in interstate commerce. (Trial Transcript, p. 116).

Therefore, on the basis of the uncontroverted facts, the Appellants' own statements and actions, and the authorities cited, it is abundantly clear that the ferryboats which travel to and from Mackinac Island are not in interstate commerce.

Appellants contend that the franchise fee of 1 1/2% of Appellants' gross receipts for providing ferry service to and from Mackinac Island is an oppressive and unconstitutional burden on interstate commerce. As is explained above, the Appellee vigorously denies that Appellants operated in interstate commerce. However, for the sake of argument, even if Appellants could be said to be operating in interstate commerce, the franchise fee is certainly no burden.

During the current (1983) season the approximate amount Appellants charge for a round trip adult fare to Mackinac Island is \$6.00. At that fare, the franchise fee charged to Appellants would amount to a mere 9 cents for each round trip adult passenger. It is frivolous to suggest that the franchise fee is a burden of such a substantial nature as to require the consideration of this Court.

It is well recognized that states or their political subdivisions may, within limits, validly impose regulations that affect interstate commerce.

"Although the criteria for determining the validity of State statutes affecting interstate commerce have

been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

Throughout this nation's history, ferries have been regarded as matters of particularly local concern. That is certainly true of Mackinac Island where the ferries play a substantial role in the life of the Island residents. The modest impact of the Ferry Boat Code is appropriate considering the legitimate and substantial local interest.

Neither *Evansville-Vandenburg Airport Authority District v. Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972), nor *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1868) supports Appellants' contentions. *Crandall* involved a tax where no identifiable benefit was provided. It was imposed directly on citizens crossing the state line, and applied even to passengers in privately owned modes of transportation. The franchise fee is not a tax, but payment for a specific benefit; it is owed by the ferryboat companies, not its passengers; and it does not apply to private boats traveling to or from Mackinac Island (which have no need for a ferry franchise). To the extent that it is applicable at all, *Evansville* supports the City's position because it permits a charge for a benefit actually provided.

Appellants' reliance on *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), is also misplaced. Unlike the present situation, that case involved a tax which was unrelated to the benefits provided. Moreover, the objects of the tax in *Complete Auto Transit* moved between different states. Appellants torture this constitutional concept by attempting to apply

it to ferryboats which travel back and forth between two cities within the same state.

On the basis of the authority cited above, the City of Mackinac Island urges this Court to conclude that when Appellants suggest that the Ferry Boat Code constitutes an undue burden on interstate commerce, they present no substantial federal question deserving of further treatment by this Court.

### **FREEDOM TO TRAVEL**

Appellants have argued that the Ferry Boat Code places a burden on their passengers' right to travel in violation of various provisions of the U. S. Constitution. Appellee does not dispute that this Court has recognized that the Constitution prohibits the imposition of burdens on the right to travel between the states, but submits that the Ferry Boat Code does not violate the Constitution in this regard.

In making this argument, the Appellants claim to be protecting not their own right to travel, but that of their passengers. This Court has often held, however, that "the Plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). See also *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960). Thus, Appellants do not have standing to raise this challenge to the ordinances based on the alleged impact on their customers' right to travel.

Assuming, however, that Appellants have standing to assert this constitutional challenge to the Ferry Boat Code, the franchise ordinance does not violate the passengers' constitutional right to freedom of interstate travel.

First and foremost, as explained fully in the interstate commerce portion of this Motion, neither Appellants, nor their passengers are in interstate commerce. The only

authorities cited by Appellants involved travel between different states, not travel between three small towns located within one state. If the passengers are not traveling in interstate commerce, then the Ferry Boat Code obviously cannot infringe on their right to freedom of interstate travel.

Second, even if interstate commerce was involved, the ordinance would not burden the passengers' right to freedom of interstate travel. Where a benefit is conferred, a reasonable charge for that benefit may be imposed and should not be construed as an unlawful burden on the right to travel.

This principle was the basis used by the United States Supreme Court in *Evansville-Vandenberg Airport Authority District v. Delta Airlines*, 405 U.S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) to uphold a fee of \$1.00 per airline passenger charged to help defray the cost of construction and maintenance of airport facilities. The key in *Evansville* was that a benefit was being provided in exchange for the fee.

In the present case, the ferryboat companies are charged a franchise fee as payment for the specific benefit of the ferry franchise. It is inaccurate to suggest that the franchise fee is imposed on the passengers. It is charged only to the ferryboat companies and is not a flat per person fee. The fact that the cost of the franchise fee may be passed on to the passengers as a cost of business does not mean that the franchise can be said to be imposed on the passengers. All costs of doing business, whatever their source, are in some way passed on to the customers of that business. The suggestion that every financial obligation imposed upon interstate passenger carriers is a burden on the right to travel because it might be passed on to their passengers is unsupportable and irrational.

However, even if the passengers do ultimately bear part of the cost of the franchise fee, they will certainly

enjoy substantial benefit from it. Virtually all of Mackinac Island is a tourist resort. One hundred per cent of the business on the Island is tied, directly or indirectly, to the tourist business. The City's intended use of these franchise fees is to make Mackinac Island a better tourist resort. Nothing could benefit the ferryboat passengers more than to enhance the beauty and appeal of Mackinac Island. When considered in this light, it is clear that a possible increase of nine cents on a \$6.00 adult round-trip ticket is perfectly reasonable and constitutes no burden on the passengers' travel.

It is also clear that the franchise fee is non-discriminatory because the charge, if passed along to the passengers, would affect all passengers, whether in interstate commerce or intrastate commerce, exactly the same way.

Even if Appellants have standing to assert the claim, their argument that the ordinance violates the constitutional right to freedom of interstate travel is unconvincing. The passengers are not in interstate commerce, a clear benefit is received in exchange for the fee and the charge is reasonable and non-discriminatory. For these reasons, the ordinance does not infringe on the passengers' right to travel.

### **EQUAL PROTECTION AND DUE PROCESS**

In their Jurisdictional Statement, Appellants have alleged that the City's requirement of a ferry franchise violates their right to equal protection and due process under the Fourteenth Amendment to the United States Constitution. The basic flaw in this argument, and the reason it must fail, is that the City's Ferry Boat Code does not impose a tax, but rather requires a franchise.

The City's Charter does not authorize it to require franchises of types of transportation other than ferries, nor does it empower the City to franchise other types of business enterprises. The Michigan Courts have unani-

mously ruled that the City is acting within its power under Michigan law in requiring franchises of the Appellants, and that the franchises issued by the City to the Appellants are valuable property rights given in exchange for the franchise fees charged. Appellants have ignored the rulings of the Michigan Courts in presenting their case to this Court. In so doing, they have repeatedly asserted that the franchise fee is a "tax", and they rely heavily on cases involving taxes. It is important for the Court to remember in reading this portion of Appellants' Jurisdictional Statement, however, that the franchise fee involved here is not a tax; it is a charge for a valuable property right. With that in mind, all of Appellants' alleged violations of the Fourteenth Amendment are meritless.

Appellants' arguments on equal protection boil down to the complaint that the City franchises ferries, but does not franchise other Island businesses. Appellants also claim that the ordinance has no "rational relation to a legitimate purpose", thus denying them equal protection. As discussed above, the Michigan courts have resolved the fact that the City was acting within its delegated authority in franchising the Appellant ferryboat operators. There is nothing arbitrary or irrational about the City's decision to franchise ferries. The City is fulfilling its municipal obligation in issuing the ferry franchises that secure ferry service for the residents and tourists coming to the Island. Certainly, this is a rational and legitimate purpose.

Further, the City does not violate the Appellants' right to equal protection by not requiring franchises of other types of businesses. The law has never required states and municipalities to treat differently situated persons identically. Appellants slide over the fact that the nature of their business is inherently different from that of other businesses. Other businesses do not need franchises.

and concomitantly, the City does not have the authority to issue franchises to them. The City can hardly be faulted for failing to do what it has no power to do; nor should it be condemned for exercising the power it has been granted.

In *Tigner v. State of Texas*, 310 U.S. 141, 60 S. Ct. 879, 84 L. Ed. 1124 (1940), reh. den. 310 U.S. 659, 60 S. Ct. 1092, 84 L. Ed. 1422, this Court examined a Texas statute which excluded agricultural business enterprises from criminal punishment for monopolistic activities to which all other types of business were subject. In holding that the statute did not violate the equal protection clause, this Court said:

"The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws', and laws are not abstract propositions. . . . *The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.* And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature." 310 U.S. at 147. (Emphasis supplied).

Similarly in the present case, the City is not required to treat different things identically, and it may franchise ferryboats without franchising other businesses.

Appellants cite *Covington and Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896) and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 420, 14 S. Ct. 1062, 38 L. Ed. 1031 (1894), implying that those cases held that the raising of revenue through the issuance of a franchise is arbitrary and an illegitimate exercise of municipal power. They did not so hold. *Covington & Lexington Turnpike Road Co.* involved a challenge to the action of the state legislature in setting different

rates on different toll roads. This Court ruled that a legislature may differentiate between roads in setting toll rates, provided there are circumstances justifying the differentiation, such as traffic volume, size of road, location, etc. *Reagan v. Farmers' Loan & Trust Co.*, *supra*, involved similar considerations as to railroad rates. These cases support the City's actions in showing that a reasonable distinction between businesses based on the nature of their operations does not violate constitutional principles of equal protection.

It is interesting to note that Appellants have not cited a single case involving a franchise in their arguments on equal protection and due process. What they have cited are a variety of cases discussing taxes. The so-called single factor formula cases involve states taxing businesses with interstate operations without adequately apportioning the amount of tax charged to the amount of business performed in the taxing state. What relevance these cases have to the instant one where a franchise to operate a ferry totally within one state is being granted by a city is unclear. Certainly the City is not, as the Michigan Courts have all recognized, seeking to tax the Appellants' income. The franchise fee is a charge for a valuable property right, not a tax.

Finally, without citing authority for the proposition, Appellants claim that the City must grant them "a right to use public property in a fashion not enjoyed by the public at large" (Appellants' Jurisdictional Statement, p. 27) in order to charge a franchise fee. They cite trolleys and utilities which lay tracks, pipes or lines in the public right of way as examples of franchisees who do receive such a right. In making this argument, Appellants once again ignore the fact that the Michigan Courts have ruled that the franchises which they receive are valuable property rights. Appellants are attempting to resurrect before this Court state issues already resolved against them.

In conclusion, it can be seen that Appellants' arguments on these issues misstate the law and the facts, and ignore the rulings of the Michigan Courts under state law. Because the City of Mackinac Island properly exercised its authority in enacting the Ferry Boat Code, because the ferry boat owners are all treated equally, because the City of Mackinac Island has required franchises of ferries for a rational and legitimate state purpose, and because Appellants receive a valuable property right and are not being deprived of property without due process, Appellants' claim of a violation of their right to equal protection and due process lacks substance and merits no further attention from this Court.

**CONCLUSION**

In conclusion, none of the arguments advanced by Appellants presents a federal question that is sufficiently substantial to warrant further briefing and oral argument, and therefore, Appellee, City of Mackinac Island urges this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

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## APPENDIX

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### APPELLANTS' FRAMING OF THE ISSUES IN THE MICHIGAN SUPREME COURT:

- I. APPELLEE DOES NOT HAVE THE AUTHORITY  
TO REQUIRE FRANCHISES OF APPELLANTS ....
- II. THE FRANCHISE THAT APPELLEE SEEKS TO  
IMPOSE ON APPELLANTS DOES NOT POSSESS  
THE CHARACTERISTICS NECESSARY TO PER-  
MIT APPELLEE TO RAISE REVENUE BY ITS  
IMPOSITION .....
- III. APPELLANTS HAVE ACQUIRED FRANCHISES  
TO OPERATE THEIR FERRYBOATS BY PRE-  
SCRIPTION .....
- IV. THE FERRY BOAT CODE FRANCHISE FEE VIO-  
LATES THE UNITED STATES CONSTITUTION'S  
PROHIBITION AGAINST THE LAYING OF A  
DUTY OF TONNAGE .....
- V. THE FERRY BOAT CODE CONSTITUTES AN UN-  
DUE BURDEN ON INTERSTATE COMMERCE  
AND RESTRICTS THE RIGHT OF FREEDOM  
TO TRAVEL .....
- VI. THE FERRY BOAT CODE IS PREEMPTED BY  
FEDERAL LEGISLATION .....
- VII. THE FERRY BOAT CODE IS PREEMPTED BY  
MICHIGAN LEGISLATION .....
- VIII. THE FERRY BOAT CODE SHOULD BE INVALI-  
DATED BECAUSE OF VIOLATIONS OF THE  
OPEN MEETINGS ACT .....

**49 U.S.C. §903(g):**

“(g) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this chapter shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors, or (2) to transportation by small craft of not more than one hundred tons carrying capacity of not more than one hundred indicated horsepower, or to vessels carrying passengers only and equipped to carry no more than sixteen passengers, or to ferries, or to the movement by water carriers of contractors' equipment employed or to be employed in construction or repair for such water carrier, or to the operation of salvors.”